DR. K. SHANMUGANATHAN (SUING BY HIS ATTORNEY DR. A. PURAVIAPPAN)

v.

PERIASAMY S/O SITHAMBARAM PILLAI

HIGH COURT, IPOH
DATO' PEH SWEE CHIN SCJ
[SUIT NO. 2105 OF 1985]
6 NOVEMBER 1993

PROBATE & ADMINISTRATION: Contentious probate proceedings - Authenticity and validity of will - Allegations of forgery - Conspiracy to defraud - Existence of Will in favour of defendant (brother of deceased) - Plaintiff (nephew of deceased) to benefit on intestacy - Whether Will complies with formalities - Should attesting witnesses sign in the presence of each other - Wills Act 1956, s. 5.

EVIDENCE: Expert witness - Evidential value of evidence of handwritting expert - Injuring credibility of witness - Burden of proof of due execution of Will and forgery.

PRACTICE AND PROCEDURE: Proceedings at trial - Preliminary point on which party to begin the trial.

The plaintiff in this case is the nephew of the deceased while the defendant is the brother of the deceased, who was a millionaire bachelor.

The plaintiff would have been entitled to the whole estate of the deceased if the deceased had died intestate for the reason that the mother of the deceased who died less than 2 months after the death of the deceased would be solely entitled to the whole estate of the deceased by virtue of the rules of distribution. The plaintiff was the sole beneficiary to the whole estate of the mother of the deceased (i.e. his grandmother) by virtue of 2 Wills executed by his grandmother, which were being contested in Indian Courts.

On the other hand, if the deceased died testate the defendant together with 2 sisters of the deceased and the plaintiff would have been entitled in equal shares to the whole of the said estate under an alleged Will dated 7 April 1982. The plaintiff claims to this Will be a forgery.

The plaintiff had filed in India a petition for letters of administration, with the Will (of the plaintiff's grandmother) annexed, to the estate of the deceased and the same was granted on 16 August 1993. However, the defendant lodged a caveat against the issue of the grant of the said letters of administration to the plaintiff.

The defendant had applied instead for letters of administration on March 1983 but before this was proceeded with another petition was filed by the defendant for probate of the Will of the said deceased on the basis of the existence of the said Will dated 7 April 1982. This led to the present case of the probate suit being heard.

Furthermore, one of the defendant's witness, a solicitor who attested the alleged Will did not appear on the resumed hearing for further examination and re-examination and the Court was informed by the defendant's Counsel that he had left the country. Plaintiff's Counsel produced a cutting from the issue of "Star" newspaper for 23 September 1988 about some allegation that the said witness was involved in a case of criminal breach of trust. Defendant's Counsel objected to that evidence on the grounds of irrelevancy as the Will was made in 1982. Counsel for the plaintiff seemed to concede that the evidence was not concerned with the credibility of the said witness.

During the course of the trial a preliminary point was raised by the plaintiffs' Counsel that the defendant had to begin first at the trial. It was firstly submitted that a party who relied on a Will, here being the defendant, should prove it. Secondly, s. 62 of the Evidence Act provided for the necessity of the proof of the signature to be in the handwriting of the person who was alleged to have signed it. Thirdly that s. 68 of the same Act provided that in the case of a document required to be attested by law, it should not be used in evidence until the attesting witness was called to give evidence. Fourthly the circumstances leading to the probate suit, even as the time the alleged Will "surfaced" should be considered.

The legal point arose on the interpretation of s. 5 of the Wills Act 1959 in the submission of both Counsel namely as to the validity of the Will if both attesting witnesses did not sign in the presence of each other.

Held:

[1] The preliminary point raised by plaintiff is upheld in that the defendant should begin first by proving due execution of the Will. The plaintiff has to prove that the Will is a forgery. Whenever a Will of a deceased person is dis-

puted by any person whose interest in the estate of the deceased person is prejudiced by the Will then the executor of the Will, here being the defendant, would have to prove the Will in an action in open Court by mandatory examination of the attesting witnesses in Court. It does not matter if the executor is the plaintiff or the defendant as once disputed, he has to propound it. The burden of proof would be on the defendant, being the executor in this case. In respect of the allegation that the Will was a forgery, the burden of proof would lie on the plaintiff who alleged it.

[2] Whenever there are any circumstances that excites the suspicion of the Court as to whether or not a Will is a true Will or whether or not it expresses the true intent of the deceased, the Court must be vigilant in examining the evidence called in propounding the Will to see if at the end of the case, such suspicion is removed or not. In addition to this, in Malaysia, fraud in a civil case has to be proved beyond a reasonable doubt.

[3] The evidence adduced by the plaintiff's Counsel was allowed to show the absence of the defendant's first witness but not on his character. No adverse reference was drawn against the credit of the said witness and against the defendant.

[4] A handwriting expert seems more like an art or music expert rather than a medical expert or chemical expert. The difference between science and art is that science is associated with demonstrable truths while art is associated with a great deal of imagination. The evidential value of such an art is very questionable and can never be conclusive.

[5] The Court accepts the evidence of the three eyewitnesses to the due execution of the Will and further holds that two witnesses to the Will need not sign simultaneously in the presence of each other and the presence of the testator. As such the will in this case was validly executed in compliance with the provisions of the Wills Act 1959.

[Judgment for the defendant with costs].

Cases referred to:
Tyrrell v. Painton [1994] CA ***(foll)***
Barry v. Butlin 2 Moor PC 480 ***(foll)***
Indu Bala v. Manindra Chandra Bose [1982] AIR SC 133 & 134 ***(refd)***
Saminathan v. Pappa [1981] 1 MLJ 121, PC ***(refd)***
Lee Yon Sin v. Chong Ngo Khoon [1982] 2 MLJ 15 ***(refd)***
Browne v. Dunn [1893] 6, the Reports, 67 HL ***(refd)***
Teng Kum Seng v. PP [1860] MLJ 225, 227 ***(refd)***
PP v. Mohd Kassim bin Yatim [1977] 1 MLJ 64 ***(refd)***
Betts v. Gannel [1930] 19 TLR 304 ***(refd)***
Wyatt v. Berry [1893] P. 5 ***(refd)***
Moon v. King [1842] 3 Curt. 243 ***(refd)***
Brown v. Skirrow [1902] P3 ***(refd)***
Faulds v. Jackson [1845] 6 Notes of cases, Supp. i. PC ***(refd)***

Legislation referred to:
Distribution Act 1958
Evidence Act 1950, ss. 67, 68, 101(1), (2), 145, 146, 155(a)
Wills Act 1959, s. 5(1) & (2)
Wills Act 1837, s. 9 (UK)

For the plaintiff - Cyrus Das (Thomas with him); M/s. Shook Lin & Bok
For the defendant - Abdul Rahim Noor (N.T. Rajah with him); M/s. Maxwell, Kenion, Cowdy & Jones

JUDGMENT

Peh Swee Chin SCJ:
This case was a contest between a brother and sisters (of the whole blood) of a deceased millionaire who died a bachelor on the one part and a lawful nephew, of the other part, of the said deceased who owned palm oil and rubber estates in Perak just prior to his death.

If the deceased died intestate, the nephew who was the plaintiff herein would be for reasons to be stated hereinafter, entitled to the whole of the estate of the deceased, whereas if he died testate, the brother and sisters (the defendant being one of them) would be entitled in equal shares to the same under an alleged will which the nephew said was a forgery, and which the defendant said was genuine and perfectly valid in this case before the Court, (the plaintiff is hereinafter called the said nephew; and the defendant the said brother).

The said nephew asserted he was named as the sole beneficiary by virtue of 2 wills both executed by the mother of the deceased in India, under which he was also appointed as a sole executor and trustee, and was the sole beneficiary to the entire estate of the said mother of the deceased, *viz.* the grandmother of the said nephew herein. Both wills (2 wills) of the mother of the deceased were being contested in Indian Courts.

The deceased died on 20 August 1982 and if he died intestate, the mother (the surviving

parent) of the deceased who was still alive at the time of the death of the deceased would be entitled solely to the estate of the deceased notwithstanding her own subsequent death on 1 October 1982, less than 2 months after the death of the deceased, by virtue of the rules of distribution as set out in the Distribution Act 1958. The said nephew, being the alleged sole beneficiary under the alleged will of his grandmother (i.e. the mother of the deceased) would be solely entitled to the estate of the deceased on the latter's intestacy.

The said nephew in India through his attorney Dr. Puraviappan filed a petition for letters of administration with the will (of the said nephew's grandmother) annexed, to the estate of the said deceased, as a sole beneficiary. Letters of administration were granted to the said attorney on 16 August 1983 and the said brother lodged a caveat against the issue of the grant of letters of administration to the said nephew.

In March 1983, the said brother applied instead for letters of administration to the estate of the deceased, on the basis of intestacy of the deceased but before this was proceeded with further to its logical conclusion, another petition this time, for probate of the will of the said deceased was filed on the basis of a will dated 7 April 1982 of the deceased, the alleged will in question in this case. The will was predictably and hotly disputed and this led to the probate suit that was heard. This was the background to the case. I will set out the material points of the evidence of the witnesses a moment later.

The case went on intermittently for a long time, and the last of Counsel's written submissions, (by consent of both parties as being the last of them), was received on 3 September 1993.

Pleadings were fairly precise and brief. The said nephew alleged that the will in question was a forgery and was not executed by the deceased and the said brother denied this and said otherwise.

After hearing arguments, the Court ordered that the said brother begin his case first. Notwithstanding this, a handwriting expert witness, called Dr. Grant, aged 84, having come from England gave evidence first before all others. I will deal with his evidence only after dealing with evidence other witnesses called by the said brother, this being the more orderly way of writing the grounds of decision to my mind.

Called by the said brother, the first witness was Mr. Wong Ah Lun, advocate & solicitor of Kuala Lumpur (hereinafter called Mr. Wong). He said he practised his law under the name of Wong and Liew at No. 54 to No. 56, Jalan Kelang, Kuala Lumpur and had been a lawyer since 1980. The deceased was introduced to him by a "home-town" friend, known as Mr. Krishnan, a businessman; the "home-town" would appear to be Sitiawan, Perak. On that day, *viz*. 7 April 1982 three Indians including the deceased and Mr. Krishnan came. The deceased gave him instructions, inclusive of his name, identity card number and address of 1624, Jalan Sultan Abdullah, Teluk Intan and the names of 4 beneficiaries to take his estate in equal shares, *viz*. Periasamy (the said brother), Thanalakhmy (a sister), Kamlavathy Ammal (another sister) and Shanmuganathan (the said nephew). He looked at the photo of the deceased in the identity card and had a look at him. The alleged will (P8) was then drafted as instructed and the deceased, he, and a clerk of his called David Navamany then signed it. The deceased had earlier told Mr. Wong after giving the instructions to the latter, that he would come back in about an hour's time to sign it at about 11.00 a.m. (This would put the time of their meeting in the room of Mr. Wong for instructions at about 10.00 a.m.). The deceased and his Indian friends who also saw the alleged will being signed however chose to stay in the office to wait just as well for the alleged will to be ready. He told the deceased his fee would be RM300. The deceased did not pay him, and they left saying that they would come back to collect it later.

It will be observed that the said nephew's name would be included as one of the four beneficiaries under the alleged will of the deceased to be signed taking an equal share with the other three.

Then, towards the end of the same year, 1982, Mr. Wong shifted his office to a new address as stated by him when he began giving evidence. While going through the files because of the moving, he said, in order to decide which of the files were to go to his store-room he discovered the alleged will of the deceased which had not been paid for yet. He wrote to the deceased asking him to collect the will and pay the fee. The letter was returned with the remarks of addressee being dead. He then wrote to the said brother (Periasamy) by letter dated 2 November 1983. The said brother then came with this

sister to see Mr. Wong. It was the said brother who paid Mr. Wong's fee.

The Court observed that this would appear to be the ostensible reason why after having filed a petition for letters of administration to the estate of the deceased, the said brother filed again a petition for probate to the same estate subsequently.

There was some correspondence between Mr. Wong and the said brother's solicitors (M/s. Maxwell Kenion Cowdy & Jones). Pursuant to this, he said he asked Mr. Krishnan for an affidavit to the effect that the person introduced to him was the deceased. He further said that the person who signed the will was the person appearing in the photograph of the identity card of the deceased.

In cross-examination, he was questioned about the nature of his work as solicitor. He further said to the effect that a matter handled by him would bear his initials *viz.* WHL (in letters). The file brought along by him was handed to Counsel cross-examining him and he said in answer that mere notices written for clients were kept in a miscellaneous file bearing the shortened word of "Misc.". He said he had shifted from his old address of Asia Life Building of Klyne Street to his present address towards the end of 1982. He was not struck by the fact that the deceased had asked for the alleged will to be made immediately. He said he compared the deceased who was with him with the photograph of the deceased in the identity card, his only means of identification. Mr. Krishnan had called him earlier in the morning of the same day or the day before 7 April 1982 (the date of alleged will). The deceased came with the said Mr. Krishnan and another and they all sat in front of him. Mr. Rajah, of the firm of the said brother's solicitors had also interviewed him in connection with this case. He took instructions from the deceased but the will was drafted by his clerk at his order. The signing was done after the deceased had read it. His clerk David Navamany (hereinafter Mr. David) also signed it. He said it was not odd for the deceased not having the money to pay the fee (RM300). The cheque for RM300 sent by the present solicitors of the said brother was returned to them as he had collected the said RM300 from the said brother in cash. No reminder was sent to the deceased earlier for the fee until the discovery of the alleged will in the file while shifting office. The returned letter which had been earlier sent to the deceased was not in the file, he could not say whether he had either seen it as he was told by his clerk about it. He said the file (which he brought to Court) was a reconstructed file with photocopies of documents coming from the present solicitors of the said brother. He said he could not remember to whom he had handed the alleged will, because there was no acknowledgment of receipt. He was served with a subpoena to give evidence. The solicitors of the said brother had sent him an affidavit with a photocopy of a will for him to affirm the same. He said the alleged will was given to someone who came to the office to collect the same.

On the resumed hearing for further examination and re-examination on a subsequent day, *viz.* 1 November 1988, about just over 1 year and 7 months later, the Court was informed by Counsel for the said brother that Mr. Wong had left the country and cross-examination of him could not continue.

Learned Counsel for the said nephew showed a cutting from the issue of "Star" newspaper for 23 September 1988 about some alleged case of criminal breach of trust in which Mr. Wong was said to be involved and said Mr. Wong was in contempt of Court, his attendance being on a subpoena. The case proceeded with a fresh witness, *viz.* Mr. David.

Mr. David who described himself as a clerk of Mr. Wong (at all material times) and presently attached to another firm of Kuala Lumpur solicitors, said in April 1982, one day, he "witnessed a will", *viz.* the will of one Mr. S. Nadarajah (the deceased) executed on the 6th floor of Asia Insurance Building, Jalan Hang Lekiu, Kuala Lumpur. Mr. Wong had called him to the former's room and Mr. David, was told to be a subscribing witness to the alleged will of Mr. S. Nadarajah (the deceased) who was in front of Mr. Wong. The deceased produced his identity card and he saw it was the same person from the identity card that was signing the will. He saw deceased signing the will followed by lawyer Wong and himself. Two other persons were there also in the room.

Mr. David said he left the firm of Mr. Wong who had not turned up in the office for about a month. After reading newspapers, he knew why. Both Mr. Wong and Mr. Wong's partner did not so turn up and he and other staff were not paid

salary for July and August, 1988. It (i.e. his job with Mr. Wong) was his first job with a legal firm and he was then only 21 years old. Mr. Wong asked him to see the deceased's identity card to find out if the deceased was the same person as appeared in the photograph of the identity card. There were 3 Indians seated with Mr. Wong when he first went in. He said the chief clerk called Mr. Chow had typed the will. He was a despatch clerk and he identified his signatures on 2 copies of the will (P8 and P14g). He said he remembered signing 3 copies. He saw the deceased wearing a white "dhoti". He said it was 7 April 1982, because this date was written on the will, otherwise he would not know when it was signed. He agreed with Counsel it was odd for himself being asked to witness the alleged will because it was the only will he witnessed. He said he was never approached by the said brother. He said all the staff had been let down by Mr. Wong. He was asked by Mr. Wong and the present solicitors of the said brother to sign an affidavit about witnessing to the will of the said deceased. He agreed with Counsel cross-examining him that Mr. Wong was dishonest for not telling him that the affidavit was not going to be used for probate application in Court. If he knew there were going to be allegations of forgery about the will, he would not have signed the affidavit (P21). He said there was nothing wrong with the affidavit he signed. He said it would surprise him to know that the alleged will had been given to an impersonator (*viz*. not the said brother). He said, quite a number of times, he did check the identity card of deceased and saw the deceased sign the will, and he agreed with Counsel that it was odd that the 2 persons who came with the deceased did not sign the will as witnesses.

The next important witness was Mr. Krishnan, aged 63, a housing developer of Setiawan Perak, also carrying on the business of running a theatre and financing. He had known the deceased for 7 or 8 years but not as a close friend. Both he and deceased had offices in Jalan Mesjid India, Kuala Lumpur. In 1982, the deceased told him he wanted to make a will and asked him to introduce a lawyer. On the next day he rang up Mr. Wong. He then went with the deceased and his own clerk called Kayane Sundram. He could not remember the date when they went, until he was told by Counsel it was 7 April 1982. It was about 10.00 a.m. when they reached Mr. Wong's office. The deceased then spoke to Mr. Wong in English asking the latter to prepare a will, giving Mr. Wong instructions. He was present. The deceased said he wanted the will immediately. They were told to come back later for the signing of the will and they chose to wait outside Mr. Wong's room. Later Mr. Wong called them in again and in the room, the deceased read through the will. Mr. Wong's clerk (identified as Mr. David) was there. The deceased then signed, followed by Mr. Wong and Mr. David, and he himself was present. After signing, Mr. Wong asked for the fee which the deceased said he would pay later. He learned of the deceased's death when he came back from India. He was asked by Mr. Wong to affirm an affidavit (P23) about the signing of the alleged will which was explained to him before signing it. Mr. Wong told him the affidavit was required for a Court case.

In cross-examination, he said he was a licensed money lender with property in India. In 1982, he had gone back to India 2 or 3 times. Mr. Wong was not his lawyer in Kuala Lumpur. He had known Mr. Wong for 2 or 3 years and Mr. Wong often came back to Sitiawan and even came to his house on his own. He did not know that the deceased was a qualified lawyer. Though he knew the said brother, but they were not close friends and the said brother had never gone to his house. He met the deceased by chance in Jalan Mesjid India when he asked him to introduce a lawyer for making a will. He did not feel it was odd for the deceased to ask him to introduce a lawyer if the deceased had his own lawyers.

Mr. Krishnan further said that Mr. Wong was just a casual acquaintance, and he recommended Mr. Wong to the deceased because Mr. Wong was an acquaintance and they were all from Sitiawan also. All lawyers were the same, he said. He and the deceased were talking on the road side for about 10 minutes. He said he himself was a past chairman of Sitiawan MIC and a former vice-president of Dindings Indian Association Manjong. He said Mr. Wong's room was a small one, and the deceased did tell Mr. Wong that the will was needed urgently. He also repeated several times to the effect that signing of the will was seen by him. The deceased was wearing a "vesti". He said he signed the affidavit.

Mr. Krishnan further said he had no need to tell lies, he had no interest in the property of the

deceased. He said he was a respectable person, having been conferred the State and Federal titles of AMN, JMN, PJK and AMP. He said he had met the deceased many times for 2 or 3 years before the making of the will. Deceased never discussed his family matters with him.

Dr. Julius Grant, was called by the said nephew as a handwriting expert in regard to the alleged will. He gave evidence on 18 September 1986 and said he was 84 years of age, and was retained by the said nephew to carry out inspection of the original will (of the deceased) in Ipoh High Court with regard to its authenticity. He subsequently put up a report (P1) which contained details of his professional background and his firm. He had given evidence in Courts once, out of U.K. *viz.* Malaysia. He handled 250 or more cases of questioned documents per year. His work took him to 10 countries in different parts of the world, and he was a past president of Forensic Science Society and other societies. He had detected forgeries in the (famous) Hitler's Diaries. He was given 16 documents which contained the accepted authentic signatures of the deceased, and also 4 signatures from 2 cheques and 2 specimen signature cards. (He then had 20 authentic signatures of the deceased). He used the comparison method by comparing these 20 signatures with the alleged signature of the deceased in that alleged will. He used an illuminated portable microscope for finding the sequence of strokes, or the line in which the pen travelled. He found 3 differences between these 20 authentic signatures (on the one hand) and the signature in the alleged will (on the other hand).

The first difference, he said, was that the upper left stroke of the letter "N" was added on in the signature in the alleged will, whereas in the authentic signature, it was written with a single continuous stroke.

The second difference was that the starting line after the "N" started at a lower level than the level of "N" in the signature of the alleged will.

The third difference was that little blobs that appeared at the end of the letter "N" in the alleged signature did not appear in the authentic signature. He had explained that blobs were shown by his microscope to be flattened zigzags. Such blobs, he said, were caused because the writer was not writing fluently and he came to an abrupt halt.

He said though it appeared to him that the letter "S" in both authentic and questioned signatures came from the same writer, there was a slight slant in the disputed signature, pointing to one-o'clock position. He said when he used the term, "highly probable", he meant 99.5% in the degree of certainty.

In cross-examination, he admitted discovering discrepancies also among the 20 authentic signatures themselves. He said when a man signed many times, there were always small discrepancies. An examiner had to assess whether such discrepancies were either normal or abnormal to the individual. He concluded that the discrepancies among the 20 authentic signatures were normal to the particular individual. Nine discrepancies involving rather elaborate details as set out in the notes of evidence were gone through by the witness in cross-examination but he regarded them as normal to the deceased.

The said nephew also called Mr. Chow Yew Hor who said he was now attached to a legal firm and was earlier working for M/s. Wong & Liew from early 1982. When shown the will (P8), he said it seemed to have been typed out from a typewriter of Wong & Liew. He said he did most of the wills in Wong & Liew. He said he did not specifically recall having typed P8. In cross-examination, when he was asked if the language in P8 was his, PW3 (hereinafter called Mr. Chow) lapsed into silences longer than the momentary type. There was a great deal of hesitation from the witness. He managed to say with regard to the words "movable and immovable" (property) in the alleged will, he normally used the words "real and personal". In regard to the words: "... in any part of the world", the common words he used were "wherever situated". With regard to the phrase: "the names of those persons not mentioned should not be entitled", he said normally, the phrase would be absent (*viz.* when he drafted a will). The other person who did some of the wills would be Jennifer. He said he now said all the wills ... And at this juncture, it seems, the witness was asked by Counsel to leaf through the pages of the file of wills containing wills made by M/s. Wong & Liew. He then said he did make most of the wills and 2 of the wills were done by Jennifer (another clerk of M/s. Wong & Liew). The alleged will in question was done by Wong & Liew's typewriter. He said Jennifer left the firm on 31 August 1981. He referred to 2 wills from the file of wills dated 10 April 1981 and 9 April 1982 respectively. The first one was

"done" by him and it was very likely the second one was also "done" by him. In the first one, the words "real and personal" were used and these words were not found in the second one. The phrase about persons not named not having any share was in neither of the 2 wills pinpointed. When a file was opened in the office, it was recorded in the file register with a reference number for both file and register. When a will was done, he said a new file would be opened for it and a "miscellaneous" number would not be given for the will. In the register of files, the name of the deceased was not there. He said Mr. David was an office boy doing despatch (of documents), filing and service work. He was not aware of any occasion when Mr. David was asked to witness to a will. He did it most of the times, and as witness and Miss Thian and Mr. Khong (other clerks of M/s. Wong & Liew would be asked to do so also).

The Court could not help noticing a certain amount of acerbity in his voice with regard to Mr. Wong.

In cross-examination, he agreed that assuming a will was to be done in a hurry, and he himself was not in, someone else in the office would have done it. He said the will could have been done in the office, and he did not type P8 (the will). He could have typed clause 3 if insisted by Mr. Wong. He was not in charge of records of the office, i.e. making enteries (to record, etc.). He said it was possible that if a will was to be done in a hurry, there would be no time to open a file. After 7 April 1982, he had seen the said brother in the office, in connection with the Court case. Mr. Wong was quite evasive when he asked him about the will.

The said nephew also called Mr. William Stanley Davidson, a senior Counsel and a senior partner of M/s. Azman & Davidson, advocates and solicitors. Until the death of the deceased in August 1982, the deceased was his client, Mr. Davidson said. He said the deceased and the said brother had disputes concerning agreements by them to buy up family property and also about a home for old folk and orphans in which the deceased and the said brother were the trustees. He knew and identified the said brother (defendant) in Court. The dispute concerning the buying up of family property was about 2 rubber estates called Periasamy Estate and Dato Estate respectively, (hereinafter P. and D. Estates respectively). P. Estate was under the control of the deceased and D. Estate was under the control of the said brother. He said to the effect that of the 4 access routes through D. Estate to P. Estate, the dispute was that the deceased should use only one of them yet another dispute was that the said brother should transfer the title to P. Estate to the deceased straightaway as the deceased contended this was provided by the "partition agreement" signed between them. However, the said brother said on the other hand the deceased should apply for probate of the estate of their late father first. Yet another dispute, he said to the effect was about another a piece of land between P. Estate and D. Estate held under a T.O.L. in the name of their late father which was both claimed respectively by the deceased and the said brother as belonging exclusively to P. Estate or to D. Estate as the case may be. The deceased tried to put up a barrier on this T.O.L. land and both tried to go for arbitration. There was further a dispute about the nomination of an arbitrator. Yet another dispute was that the deceased wanted to build labour line on the T.O.L. land and to this the said brother objected.

The deceased was very polite, rather long-winded and indecisive, extremely cautious, quite stubborn, and fastidious, that was how Mr. Davidson found the deceased to be. He explained the dispute about the old folk and orphans' home, (hereinafter the orphanage). Their father set up the orphanage and with the death of their father both the deceased and the said brother became the trustees. The trust (about the orphanage) consisted of the orphanage and a rubber estate and the trustees were to use the income from the rubber estate to run the orphanage. He said the deceased had complained about the said brother "running the show" and he was not given accounts, which, when received later, showed that the trust money had been deployed in the said brother's moneylending business. With the consent obtained from the Attorney-General, an originating summons was filed by the deceased for the removal of the said brother as a trustee, and the said brother resigned on the eve of the hearing of the originating summons, and a consent order for the said brother ceasing as a trustee was obtained on the next day.

The said brother called also Mr. Karuppiah aged 70, employed by the deceased as his cook at and before the deceased died, and was now a cook at an Indian restaurant in Teluk Intan, (hereinafter the cook). He said to the effect that

he had worked for the deceased for 7 to 8 years as a cook, staying in the same house of the deceased where the deceased lived. He said the deceased had occasional visits from friends or relatives and sometimes went to Kuala Lumpur travelling by bus, mostly in the morning leaving the house between 6.45 a.m. and 7.00 a.m., in the morning. He said that the said brother whom he knew also had come to the house. They spoke to each other. The day before the deceased died, he had a fall on his back which resulted in bleeding from the back of his head. He carried him. He called for a doctor who came and gave him dressing. The deceased asked him to telephone the said brother, and the deceased looked drowsy. When the said brother came the deceased was unconscious and the said brother took the deceased in his car to the hospital where he died at about 12.00 midnight. The said brother told him about the deceased's death in the hospital. The said brother used to visit the deceased.

He maintained that the said brother had come that day and taken the deceased to the hospital. He remembered also that, (on another occasion) the said brother had come to see the deceased and given a sandalwood box to the deceased after the said brother had just returned from India. He could not remember any other occasion when the said brother came to see the deceased. He agreed that the said brother was not a frequent visitor. The deceased used to wear "dhoti" and the said brother lived in another house along the same road in Teluk Intan. The said nephew regularly saw the deceased. He said the deceased had a fall at about 12.00 noon and he called for a doctor from Reddy Clinic and he had spoken to a nurse there. He did not immediately call for the said brother because the deceased told him he was alright and the sister of the deceased had come at about 4.00 or 4.30 p.m. He maintained the sister did not ask him to call the said brother and it was he who called the said brother. At about 4.00 to 5.00 p.m. when the deceased was drowsy, deceased asked him to call the said brother, when the sister was still there. The said brother and the sister took the deceased to the hospital. When he called the said brother, the deceased was still a bit conscious.

The said nephew also called Mr. Sri Kumar, a solicitor from Kuala Lumpur who had acted for the deceased in the purchase by the deceased of a building in Kuala Lumpur; bought at the price of RM1.5 million. He said the deceased was wearing a jacket and trousers and not "dhoti" and he was prompt in paying fees. He found the deceased to be extremely careful man, e.g. taking home the sale and purchase agreement to study before signing it. He said the deceased was not the type of man to sign documents prepared by clerks. The deceased did not ask him to recommend a lawyer to do a will for him.

In cross-examination, he agreed this transfer was the only work done by him for the deceased. The total fee for the transfer inclusive of disbursements was RM11,663.20. RM500 was paid on 28 October 1980, and on 19 February 1982, another RM5,500 was paid. He explained that when he said the deceased was a prompt "paymaster", he meant the deceased was not the one to complain about fees. He said he did not know if deceased was in financial difficulty for staying in that hotel *viz.* Palace Hotel, Jalan Mesjid India. He said the deceased was not a prompt "paymaster".

The said nephew also called Mr. Balaniandy aged 50, an estate clerk of Sussex Estate who said he worked for the deceased from 1973, also when deceased died on 20 August 1982, when he was working at the deceased's office at Jalan Sultan Abdullah, where deceased lived also. He said to the effect that on 7 April 1982, he started work at 8.00 a.m. as usual and he identified in Court a cheque for RM7,000 which he cashed at 10.35 a.m. and he was given (by the deceased) the cheque at 10.15 a.m. The cheque was for paying wages. He came back from the bank in question and gave the money to the deceased who gave it back to him after apportioning the money. One Teoh Cheow Soon came and collected another cheque from the deceased at about 11.00 a.m. in his presence. He himself left at 12.30 p.m. The cheque for RM7,000 and the other one for Teoh Cheow Soon were prepared by the deceased in his presence. He referred to and identified copies of filled-up forms sent to Statistics Department. These documents were signed by the deceased before he himself left to pay workers at 12.15 p.m. when the deceased told him the deceased himself was going to Kuala Lumpur.

He said he worked in Kamachi Estate from 1971-1973 and after 1973, the estate came under the control of the deceased. At the present place where he worked *viz.* Sussex Estate, his employer was Dr. Puraviappan, (the attorney

by whom the said nephew sued in this action herein). He said he was the only clerk there, and denied he was an office boy, and only studied up to Form IV. To this day, he was still working for Dr. Puraviappan. He disagreed that copies of the said form were made on a date later than 7 April 1982. There was a cook working for the deceased at the place. After cashing the cheque for RM7,000 he gave it to the deceased who did count the money and when he left at 12.30 p.m., the deceased was still in the office. He said the deceased and the said brother were like enemies and he had never seen them together. The deceased scolded the said brother once in every 3 or 4 days by using words like "stupid" behind the back of the said brother. He remembered the wedding of the deceased's niece in the deceased's house to which the said brother was allowed to come, on account of the wedding. When he worked for the deceased, his salary was RM320 p.m. inclusive of overtime, and the present salary working for plaintiff (Dr. Puraviappan) was RM630 p.m. He was with the deceased on the day before deceased died on 20 August 1983. He said on any working day, only he and the deceased were in the house and their tables were 10 ft. from each other. The deceased scolded the said brother only behind the said brother's back by grumbling about the said brother.

The said nephew also called Mr. S.B.A. Raju who was working as manager of a firm of estate surveyors and the deceased was a client who owned a 4-storey building in Jalan Bunus, off Jalan Mesjid India, Kuala Lumpur. There was a meeting at 3.00 p.m. on 7 April 1982. The deceased came at about 2.00 or 3.00 p.m. It lasted for about 1 hour. He never saw him wearing anything other than pants and shirts. Possibly he came at about 2.30 p.m. He said he had seen him in his "dhoti" in the deceased's hotel room. He engaged the services of a firm of solicitors in Kuala Lumpur called Ghazali and Gomez.

The said nephew also called Chia Yoke Mooi, the supervisor of Palace Hotel off Jalan Mesjid India. She said the hotel staff were told to dispose of accounts books of more than 7 years old, and thus the hotel register (the relevant one) had been thrown away. In February 1991, one man (called and identified) came and made photocopies of extracts of the hotel register for 6 April 1982 up to 9.40 p.m. and 7 April 1982. The deceased was shown to have checked into the hotel on 7 April 1982 at 5.30 p.m. She said she did not know at what time the deceased had arrived in Kuala Lumpur that day

I have not highlighted in the grounds of judgment the evidence of other witnesses not mentioned above for which please see the notes of evidence. I found it not essential to do so, but all such evidence has been scrutinized closely and again taken into consideration in arriving at the Court's decision. I will deal shortly with my findings as far as possible on the evidence of important witnesses.

It is convenient at this stage to deal with a preliminary point just as well which was taken by the learned Counsel for the said nephew and my ruling on it then and there in the course of the trial. The preliminary point was that the said brother had to begin first and the grounds could be summarized as follows. It was submitted first, a party who relied on a will should prove it; secondly, s. 67 of the Evidence Act provided for necessity of the proof of a signature to be in the handwriting of person who was alleged to have signed it; thirdly, s. 68 of the Evidence Act provided that in the case of a document required by law to be attested, such document should not be used as evidence until the attesting witness was called to give evidence; and fourthly the circumstances leading to the probate suit, such as the time the alleged will "surfaced" should be considered.

Learned Counsel for the said brother replied that the probate had been granted by the Court and if the said nephew alleged it was fraudulently made, the said nephew would have to prove it *viz.* to begin first.

I upheld the preliminary point in favour of the said nephew by holding that the said brother had to begin first by proving due execution of the will, and the said nephew would have to prove that the will was a forgery and the Court would later decide on the questions of due execution and forgery of the will in question. I need to explain now my reasons for my ruling.

As in this instant case also, whenever a will of a deceased person is disputed by any person whose interest in the estate of the dead person is prejudiced by the will, then in a probate suit at his instance, he may compel the executor of the will to propound the will, *viz.* to prove the will in solemn form *viz.* to prove the will in an action in open Court by the mandatory examination of the attesting witnesses in Court if they or

the survivor of them is alive. Such an executor may, for his own protection propound the will in solemn form, even when he is not compelled to do so where to obtain the probate of the will in simple form or to prove the will in simple form *viz. ex parte* on the basis of affidavits, will be a fruitless exercise in view of a challenge to him.

Thus in the instant case, the said brother, the executor in the alleged will of the deceased, would have to propound the said will in solemn form. It did not matter whether the said brother was the defendant or plaintiff in this case, as once the will was disputed, he had to propound it. The *onus probandi* or burden of proof (*viz.* the burden of adducing evidence) would be on such an executor or the said brother (the defendant) in this case. Therefore the said brother, who was the defendant, had to begin first, *vide Tyrrell v. Painton* [1994] p. 151, CA and *Barry v. Butlin* 2 Moor PC 480.

As to the allegation that the will, or the signature to the will was a forgery, the burden of proof would lie on the plaintiff who alleged it; no advantage can be gained by paraphrasing s. 101 of Evidence Act 1950 which is set out below:

> Section 101(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Further, in connection with my consideration of the evidence of the parties, I ought to mention two guiding principles on which I relied.

The first is that whenever there is any circumstance that excites the suspicion of the Court as to whether or not a will is a true will or whether or not it expresses the true intent of a deceased, then the Court must be vigilant in examining the evidence called in propounding the will to see if at the end of the case, such suspicion is removed or not. See *Tyrrol v. Painton, supra*. What excites a Court's suspicion, I think, was very well expressed as: "A circumstance would be 'suspicious' when it is not normal or is not normally expected in a normal situation or is not normally expected of a normal person", see *Indu Bala v. Manindra Chandra Bose* [1982] AIR SC 133 & 134. It need not be very grave suspicion.

The second principle is that in Malaysia, fraud in a civil case has to be proved beyond a reasonable doubt, see the Privy Council case of *Saminathan v. Pappa* [1981] 1 MLJ 121, PC and any transaction partaking of fraud can be described as fraudulent so as to require this high degree of proof, thus even the allegation of charging excessive interest was held to be an allegation of fraud in substance, in *Lee Yon Sin v. Chong Ngo Khoon* [1982] 2 MLJ 15.

The will of the deceased suddenly emerged after both the said nephew and the said brother had filed their respective petitions for letters of administration on the basis of the intestacy of the deceased. Such emergence was not normally expected in a normal situation, to use the words quoted earlier, though occasionally, many a next of kin of a deceased person has been known even to insert appeals in the newspapers for information as to whether any particular deceased person has made a will anywhere.

The suspicion of the Court was thus excited by the said emergence and the Court, when viewing the evidence, would have to be vigilant to see if such suspicion had been removed. This was therefore borne in mind in evaluating the evidence which I would deal with shortly.

I think I ought to give my grounds just as well of certain other rulings which I made in the course of trial. Mr. David when cross-examined said, that Mr. Wong had not turned up in the office for about a month in 1988 and he learned that Mr. Wong was involved in a case of criminal breach of trust, and an issue of the "Star" newspaper for 23 September 1988 was produced (P19) in support. Objection was raised to such evidence by learned Counsel for the said brother on the ground of irrelevance as the will was made in 1982 (*viz.* 6 years previously). Learned Counsel for the said nephew seemed to concede that the evidence was not concerned with credibility of Mr. Wong. The Court ruled that such evidence was allowed to show the absence of Mr. Wong, but not on his character.

I give now my grounds for the ruling. When Mr. Wong did not appear in Court for further cross-examination and re-examination, the Court, apart from anything else, would normally draw an adverse inference against the said brother in the absence of an explanation. The Court therefore would not draw such an inference against the said brother.

The Court would also not draw another inference affecting or against the credibility of Mr. Wong just solely by virtue of his absence from his office and the newspaper report about his alleged involvement in the criminal case. The reasons follow.

The usual way to injure a witness's credit is while the witness is still in the witness box under cross-examination, see e.g. ss. 145 (in cross-examination as to any previous written statement) and 146 (evidence of bad character, *inter alia*). However, s. 155 provides an alternative mode of injuring his credit on grounds stated therein, e.g. by sub-section (a). Under s. 155(a) the credit (credibility) of a witness can be injured by calling any other witness to the box to testify that from his knowledge, the first-mentioned witness is unworthy of credit; in other words, without the earlier stated necessity of having to cross-examine the first-mentioned witness in the box.

The reason for the necessity of injuring the credit of a witness only when or at the time when such witness in under cross-examination only, ordinarily is in order that an opportunity is afforded to the the witness sought to be discredited, to explain allegations against him and if necessary to adduce further evidence to rehabilitate his credit. One of the two rules of natural justice would also permeate into such a situation, *viz. audi alteram partem*.

Thus in *Browne v. Dunn* [1893] 6, The Reports, 67, HL, Lord Halsbury at p. 76, in connection with the provision of such opportunity to explain said:

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation and an opportunity very often to defend their own character.

Lord Herschell, at p. 70, strongly deprecated the situation of not directing the attention of such a witness sought to be discredited, to imputation intended, to be made against him and to quote further, his Lordship said:

> ... and then, when it is impossible for him to explain, as perhaps he might be able to do if such questions had been put to him, the circumstances which, it is suggested that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.

The rule of such necessity explained above applies both to criminal and civil cases. The Court therefore decided that it would not draw any adverse inference against the credit of Mr. Wong for reasons given above. The story in the "Star" newspaper cutting, e.g. was never put to Mr. Wong while he was in the box under cross-examination.

Dealing with evidence in connection with the said brother's propounding of the alleged will, Mr. Wong's evidence, the gist of which was set out above, was found to be quite satisfactory though the Court directed its mind, after hearing and seeing him in the box, to the suspicion and the unspoken but very loud allegation that he was engaged in a pernicious conspiracy with the said brother, M/s. Krishnan, David and others to deprive the said nephew substantially of his right to the entire estate of the deceased.

While giving evidence, Mr. Wong did not betray any sign of nervousness; he was quite relaxed and gave evidence matter-of-factly in a manner which any solicitor, having no axe to grind, would have behaved in the box. The Court would have however to test his evidence against the rest of the evidence of the case, of course.

Very extensive cross-examination of Mr. Wong was carried out and from it, a number of points were sought to be made by learned Counsel for the said nephew and were all considered by the Court. A few merited some specific findings from me. I found nothing suspicious in P13A and P13B being copies of each other of the statement of Mr. Wong prepared before Mr. N.T. Rajah, a senior partner of the firm of solicitors for the said brother but who did not appear in Court as Counsel. Mr. Rajah interviewed Mr. Wong after the service of the subpoena on Mr. Wong to give evidence in this case. I accepted that Mr. Wong shifted his office towards the end of 1982 and on shifting office he discovered that the fee of RM300 had not been collected and he wrote the first reminder to the deceased and about not having received a reply from the deceased. He then wrote to the said brother, the executor named in the alleged will. I found it was all quite consistent with the common course of conduct of solicitors or other human beings in similar situations that no adverse inference should be drawn against Mr. Wong for not knowing who received the original copy of the alleged will from his office. There was confusion no doubt about it and I did not think he bothered very

much about it either so long as he received the fee of RM300. Such confusion could be consistent with his innocence about the allegation of forgery as equally with his guilt, putting such confusion at the highest against him. The same could be said about the other evidence of Mr. Wong in answer to criticism directed to it. The Court took into consideration circumstances connected with the shifting of one's office, where a commonplace document like a will not yet given to a client and forgotten by a solicitor like Mr. Wong could turn up suddenly. Such a document together with the fee of RM300 could have been more probably than not, forgotten earlier by Mr. Wong. Drawing a will for a client and billing a client for RM300 would have been usually an insignificant part of a lawyer's work. His manner of giving evidence and the nature of his evidence all impressed me as a witness of truth. After considering his evidence, and seeing him in the box, the suspicion excited by the rather "convenient" emergence of the will began to sound very far-fetched.

Further I found the evidence of Mr. David quite acceptable though he laboured under a not inconsiderable residue of bitterness against Mr. Wong, his employer, who had left him and other staff without salary for 2 months and unemployed, and in a state of great personal embarrasment conceivably towards his friends and relatives, such that he did heartily agree in cross-examination that Mr. Wong was dishonest because he said that if he knew that the affidavit (P21) about signing the will was to be used in the probate action and not for purpose of obtaining a grant of probate, he would not have sworn it before a commissioner for oaths, the impression given being that he was thereby deprived of a chance for wreaking vengeance upon Mr. Wong.

Mr. Krishnan (DW3) gave evidence in a calm manner. When seeing him in the box, there was nothing at any time to suggest he was hiding something such as part of a conspiracy to defraud the said nephew. He was an Indian community leader in Sitiawan with 4 titles conferred on him by the Ruler in Perak and Yang diPertuan Agong. He described himself as a housing developer, also running a theatre and "doing finance". His evidence was impressive, convincing as the other two subscribing witnesses. The Court would still have to test it against the evidence called on behalf of the said nephew to come to its conclusion in accordance with the tests as described above, *viz.* whether the suspicion in regard to the will had been firmly removed at the end of the trial and whether forgery had been proved beyond a reasonable doubt.

While listening to the evidence of the handwriting expert, I became increasingly aware of the differences between science and art, the former being associated with demonstrable truths while the latter, with a great deal of imagination, this despite the impressive manner of his giving evidence. Thus a school boy can watch a Bunsen flame go off when a glass container encloses the flame in a laboratory to demonstrate the using-up of oxygen present earlier in the air in the glass container. The presence or absence of oxygen can thus be demonstrated even to a school boy but compare this with a painting done with a dash of colours of indefinite shapes or a piece of classical music; an art expert or music expert as the case may be, in explaining the painting or the music would have to rely on a good deal of imagination. A handwriting expert, I reluctantly conclude would seem much more like such an art or music expert rather than a medical expert or chemical expert, for example.

Dr. Grant based his opinion on comparing the 20 authentic signatures of the deceased with the signature in the alleged will. He said he found the 3 important differences on such comparison, yet he found a lot more differences among the 20 authentic signatures themselves, when cross-examined, but his explanation was that the differences among them were normal to the deceased and repeatedly he said so. I did not find such explanations of such normality convincing in the least.

When a man signs his name many times, a lot of differences can easily be found among the signatures simply because each of the resulting signatures is not an impress of a metal seal or rubber stamp. I am quite disillusioned with the expertise of handwriting experts among whom Dr. Grant must figure prominently. I regret I have to state views so unappreciatively of them, but I seem to be in good company. Short of a printing block being used, the hope of getting a perfect sameness of signature is probably forever elusive.

Thus the dictum of Thomson CJ (as he then was) in *Teng Kum Seng v. PP* [1860] MLJ 225, 227 in which the evidence, *inter alia*, against the

accused in an extortion case was the evidence of the handwriting expert in connection with the extortion letter, said, in referring to such evidence of the handwriting expert:- "Such evidence is always of course of very questionable value, particularly in the case of Chinese characters ....". The phrase "very questionable value" suggests a feeling this Court so keenly shares now.

In similar vein, Hashim Yeop A. Sani J. (as he then was) spoke of the evidence of handwriting expert in *PP v. Mohd Kassim bin Yatim* [1977] 1 MLJ 64 in which the accused faced a charge of making a false statement in connection with a passport application. His Lordship said:

> Evidence of experts can never go beyond an opinion and can never therefore be of absolute certainty. It has always been accepted that expert evidence especially of handwriting can never be conclusive. But the proper way to assess the evidence in this case would be to see whether the Court could act on such evidence if there was corroboration either by direct evidence or circumstantial evidence. It is only with such approach that a proper decision can be arrived at.

I am in entire agreement with the approach one should adopt in considering such evidence. A bit more on the evidence of the expert called by the defendant, probably the evidence of Dr. Grant would have prevailed if the plaintiff had not called these 3 eye-witnesses. I would be failing in my duty if I were to reject their evidence.

Continuing my findings on various important witnesses, I accepted the evidence of Mr. Davidson a senior Counsel based in Ipoh that there were serious differences between the deceased and the said brother, as to whether the transfer of P Estate should be done first or the grant of probate for their father be applied for first; about the problem of the T.O.L. land in question, and about intended removal by the deceased of the said brother as a trustee of the orphanage cum-old folk's home. I found that indeed the relations between them were strained in or around 1980. This would not detract completely or substantially from the truth of that rather enduring cliche that blood is thicker than water. In thoughts in anticipation of death as would necessarily be involved in making a will, the "thickness" of such blood would also surface so that it was entirely possible so that the said nephew, not being of the whole blood would not be preferred over the said brother especially since the said nephew under the 2 disputed wills of his grandmother (the deceased's mother) would take wholly the estate of his grandmother.

About the evidence of Mr. Balaniandy who worked for the deceased as a clerk both during the time when the alleged will was made and the time the deceased died. He was far too assertive about the times the deceased did this or that, or that the deceased left for Kuala Lumpur at 12.30 p.m. on that day so that it would virtually make it impossible for the deceased to have made the alleged will at all in Kuala Lumpur. Such perfect evidence about times was belied by the salient fact that he was speaking in a witness box of one day quite some years ago. The way he said about the deceased and the said brother being enemies with such unusual emphasis gave one an impression of exaggeration. I could not accept his evidence at all at face value, in fact I rejected his evidence about the times, *viz.* 2.30 p.m. etc. which was calculated to bolster up the case of the said nephew.

About the evidence of Mr. Chow Yew Har (hereinafter Mr. Chow), a former clerk of Mr. Wong who was called by the nephew, my lasting impression of him is quite vivid. Like other members of the staff of Mr. Wong, he could have most probably felt very much betrayed by Mr. Wong who had disappeared, leaving his salary for 2 months unpaid, jobless and embarassed in the eyes of his family and friends. It was clearly discernible when he gave evidence that he was of 2 minds; to give evidence according to the truth or "to teach that rascal (Mr. Wong) a lesson". This attitude could have been noticed by one of the parties herein who had decided to call him and not to call Mr. David who was called by the other party. He said that the alleged will was typed by a typewriter of the office of Mr. Wong, (before Mr. Wong disappeared, that is). He said he could not recall having typed the alleged will. He said he did "most" of the wills in Mr. Wong's office. He lapsed into long silences when asked whether the language in the alleged will was his. He said he normally used the words "real & personal" instead of "movable and immovable" property as appeared in the alleged will. When leafing through the pages of the file containing wills made in Mr. Wong's office, 2 out of the wills were not done by him and they were done by Jennifer, another fellow member of the same staff. When it was made known to him that the said Jennifer had left the firm of Mr.

Wong on 31 August 1981 (the alleged will, by comparison, was made on 7 April 1982), Mr. Chow then said one of the 2 wills which he said earlier, he did'nt "do", was done by him and the other one was also very likely done by him.

At the end of the whole case, much more probably than not, Mr. Chow typed the alleged will as instructed by Mr. Wong despite his allegation that he could not recall having typed it. There was nothing improbable that Mr. David, an Indian, was asked by Mr. Wong to sign as a witness and not him, because the deceased and 2 of his companions who called on them for making the will were Indians. In fact I found calling Mr. David in to sign as a witness more in accordance with common sense and business efficiency calculated to give more confidence, or convenience and common course of conduct of Malaysians of diverse races.

A legal point emerged in the submission of both learned Counsel on the interpretation of s. 5 of Wills Act 1959, the relevant sub-sections of which are set out below for ease of reference:

> Section 5(1) No will shall be valid unless it is in writing and executed in manner hereinafter mentioned.
>
> (2) Every will shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; such signature shall be made or acknowledged by the testator as the signature to his will in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

Sub-section (2) was of particular importance having regard to the submissions of Counsel. Learned Counsel for the said nephew submitted that, because of s. 5, in connection with the evidence of one of the attesting witnesses, the will was invalid because both the attesting witnesses did not sign in the presence of each other, (the evidence on this point will be dealt with later). Learned Counsel for the said brother submitted on the other hand that so long as the testator signed the will or acknowledged his signature in the presence of such 2 attesting witnesses, both in the presence of the testator, the attesting witnesses need not sign in the presence of each other.

On Wills Act 1959 as modelled on Britain's Wills Act, 1837, s. 5 of our Act is in *pari material* with s. 9 of Britain's Act. On the question as contended by both learned Counsel in their respective but different ways, the position in England on the question is settled. It is as follows: First, the testator must in both cases, either sign the will, or acknowledge his signature already made on to his will, in the joint presence of the two attesting witnesses; *Betts v. Gannel* [1930] 19 TLR 304; *Wyatt v. Berry* [1893] p. 5; Secondly both attesting witnesses must sign their respective names in the presence of the testator, after the testator has just made his signature or acknowledged his signature already made earlier; *Moon v. King* [1842] 3 Curt. 243; *Brown v. Skirrow* [1902] P3 at p. 7. Thirdly it is not essential for both attesting witnesses to sign in the presence of each other, *Faulds v. Jackson* [1845] 6 Notes of cases, Supp. i PC; *Brown v. Skirrow (supra).* The nett effect is, for the purpose of the present case before me, that the two witnesses to the will need not sign simultaneously in the presence of each other and the presence of the testator. It is much more easy to illustrate than explain.

The said settled position in England would clearly encompass a situation in which a testator can make his signature in the presence only of one of the attesting witnesses and subsequently acknowledge his own signature made earlier to another attesting witness who was absent earlier and the latter can also sign as witness to the will on such a later occasion before the testator but also in the presence of the first mentioned witness. Such a situation will comply with the requirements of Wills Act 1959 as well as within the case law interpreting it.

On evidence on this particular point, I may just as well mention once more the material parts of it and my finding on it. According to Mr. Wong, one of the two attesting witnesses, (*vide* p. 35 and p. 36 of the notes of evidence), the deceased (who was also himself a barrister) read it and signed it in front of him, and he then called his clerk, Mr. David, who then signed it in the presence of both the deceased and him (Mr. Wong).

Mr. David said he was called in to Mr. Wong's room when he was told that he would be a witness to the will and there, he saw one S. Nadarajah who produced his identity card for his inspection. He saw the said Nadarajah

sign the will, followed by the signing of Mr. Wong, and then himself (see p. 64 of notes of evidence). S. Nadarajah, was the name of the deceased.

Mr. David was cross-examined on or with reference to this point, repeatedly and extensively but he stuck to his story, first at p. 47 of the notes of evidence, then again and again at p. 49, p. 50, p. 51, p. 52, p. 59 and finally at p. 60, altogether 7 times.

Mr. Krishnan who was with the deceased throughout in the office of Mr. Wong that day said also the deceased signed first, followed by Mr. Wong and then by Mr. David. He was also cross-examined extensively but he did not budge.

I allowed Mr. David to be cross-examined so many times on the same point despite the same answers because he differed from Mr. Wong on this point, but despite his not being paid 2 months' salary by Mr. Wong and being left jobless by him, a situation as excerbating as can be for a wage earner and his family, he did not waver from his story. I took into consideration Mr. Krishnan's evidence, Mr. Krishnan had no axe to grind either. For Mr. Wong he must have attested numerous wills of clients, therefore his memory could hardly be precise on this point of detail. For Mr. David, however, it was the first time in his life that he had attested the will, his memory should be more probably reliable or precise.

I therefore preferred Mr. David's evidence on this point to Mr. Wong's. This of course did not render Mr. Wong's other evidence worthless. It would be considered in the circumstances then prevailing tested with other evidence and given its due weight.

I therefore accepted the evidence of M/s. Wong, David & Krishnan that the alleged will in this case was made by the deceased in the office of Mr. Wong on the date stated in the will and that the will was validly executed in compliance with the provisions of the Wills Act 1959 in regard to such formalities for a valid will. I made this finding after considering all the evidence especially that of the handwriting expert called by the said nephew.

For reasons given above, I gave judgment for the defendant (the said brother) with costs.

MALAYAWATA STEEL BHD.

v.

MOHD YUSOF BIN ABU BAKAR & ANOR.

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY J.
[ORIGINATING MOTION NO. 25-48-93]
3 MARCH 1994

ADMINISTRATIVE LAW: Industrial Law - Dismissal of employee - Reference under s. 20(3) of the Industrial Relations Act 1967 - Collective Agreement and general conditions - Domestic Inquiry - Whether any express conditions in collective agreement or general conditions that domestic inquiry is mandatory - Interpretation of Collective Agreement and general conditions - Section 33 of Industrial Relations Act 1967 - Scope of ss. 33(B)(1), 30(5) & 56 of the 1967 Act - Function of High Court - Duties of inferior tribunal - Excess of jurisdiction - Whether in a reference under s. 20(3), the Industrial Court has power to inquire under s. 33 of Industrial Relations Act 1967 - Certiorari - Retrial - Whether High Court in issuing order of certiorari has power to order retrial of matter in Industrial Court by mandamus.

In this case, the first respondent, an employee of the applicant was dismissed on the ground that the first respondent was alleged to be frequently absenting from work without leave. The first respondent claimed unfair dismissal and the matter was referred to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967.

The issues were:

1. Whether the Industrial Court has the jurisdiction to interpret the collective agreement and the general conditions under a reference which was made pursuant to s. 20(3), when there was no application made under s. 33 of the Industrial Relations Act 1967.
2. Whether the Industrial Court could proceed to hold its own inquiry, through evidence which was addressed before the Court as to whether the first respondent was dismissed without just cause and excuse, i.e. after having made a finding that there was no domestic inquiry.

Held:

[1] The Industrial Court is clearly vested with jurisdiction under s. 30(1)(5) & (6) of the